91-1172

No. _____

Supreme Court, U.S.
FILED
JAN 15 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

SNOWSHOE COMPANY, JOSEPH F. BURFORD and S. FRANKLIN BURFORD,

Petitioners.

vs.

MICHAEL L. BRAY and STEPTOE & JOHNSON, a partnership,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

S. FRANKLIN BURFORD
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Attorney for Petitioners

QUESTIONS PRESENTED

1. Whether a bankruptcy judge, who had already declared, by his own court order, that he was "disqualified" by 28 U.S.C. § 455(b), in a case, by reason of his bias and prejudice for the law firm of which the Trustee is a partner, is, thereafter, "disqualified", by 28 U.S.C. § 455, from ruling on a motion, in the same case, for the removal and surcharge of that trustee?

2. Whether the bankruptcy court, without (a) any response from the trustee-respondent; (b) the taking of or permitting the presentation of evidence; or (c) any hearing; violated the law and the First Amendment to the Constitution, by denying, *sua sponte*, a motion to remove and surcharge trustee?

NOTE - PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the Fourth Circuit (Supreme Court Rule 14.1(b)).

NOTE - SNOWSHOE COMPANY, A CORPORATION

The Snowshoe Company has no parent corporation and no subsidiaries (other than wholly owned) (Supreme Court Rule 29.1).

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IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

In Re: SNOWSHOE COMPANY: JOSEPH F. BURFORD; S. FRANKLIN BURFORD,

Petitioners,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

None of the opinions below has been officially reported. The Fourth Circuit opinion denying rehearing, filed December 16, 1991, is reprinted in the Appendix, beginning at A-1. The opinion of the Fourth Circuit, filed November 13, 1991, is reprinted in the Appendix beginning A-5. The District Court decisions and orders filed November 30, 1990 and January 25, 1991 are reprinted, respectively, in the appendix, beginning at A-10, A-31, A-33, and A-36. The Bankruptcy Court decision filed March 29, 1988 is reprinted in the appendix, beginning at A-38.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l) and 28 U.S.C. § 2101(c). The judgment denying rehearing of the Court of Appeals for the Fourth Circuit was entered on December 16, 1991. This Petition is timely, having been filed within ninety (90) days of that date.

PROVISIONS OF LAW INVOLVED

Amendment I to the Constitution of the United States, in relevant part, provides:

> "Congress shall make no law *** abridging *** the right of the people *** to petition the Government for a redress of grievances."

The statutory provisions of Title 28, United States Code, in relevant part, provide:

> § 455. Disqualification of justice, judge, or magistrate.
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.
>
> (b) He shall also disqualify himself in the following circumstances;
>
> (1) Where he has a personal bias or prejudice concerning a party, *** .
>
> ***
>
> (d) For the purposes of this section the following words or phrases shall have the meaning indicated:
>
> (1) "proceeding" includes pretrial, trial, appellate review, or other stage of litigation;

Local Rule 2.07 of the Local Rules for the District Court for the Northern District of West Virginia (which are,

specifically, made applicable to the Bankruptcy Court of that District), in relevant part, provides:

Rule 2.07

MOTIONS PRIOR TO TRIAL AND OBJECTIONS TO INTERROGATORIES AND REQUESTS FOR ADMISSIONS

***

(f) Submission of Briefs or Memoranda Opposing Motions.

Any party opposing any motion shall file two (2) copies of a responsive brief, together with any opposing affidavits, deposition transcripts or other documents, within fifteen (15) days after service of the movant's brief. Any respondent who fails to comply with this rule shall be deemed not to oppose such motion.

***

STATEMENT OF THE CASE

A. Proceedings and Disposition Below

This case involves a motion to remove and surcharge trustee made by the petitioners, on February 13, 1988, in the bankruptcy case of In Re Snowshoe Company, then pending in the Bankruptcy Court. Petitioners alleged in the motion the Trustee's (Michael L. Bray's) violations of his official duties as Trustee of the Bankruptcy Estate of the Snowshoe Company; which violations by the Trustee had, (a) resulted in losses to the Snowshoe Company,its Bankruptcy Estate, creditors and shareholders of $32,087,351.91; and, (b) consisted of the Trustee's dealings with Shenandoah Federal Savings and Loan Association and others, with whom the Trustee and the law firm (the Trustee's Counsel) of which he is a partner had conflicting adverse interests that were never revealed by the Trustee or his Counsel, to the Court; not even revealed, (1) when the Court had directed him (the Trustee) to reveal "actual conflicts"; (2) in accordance with the mandatory requirements of Bankruptcy Rule 2014(a); (3) each time the Trustee obtained Court

approval of his dealings with the interested parties with whom he held the undisclosed conflicting interests; or, (4) each time he (the Trustee) obtained Court approval of his and his Counsel's fees and expenses.

With the motion, the petitioners filed a Memorandum of Law, stating that the Supreme Court opinion in *Mosser v. Darrow*, 341 U.S. 267 (1951), required the removal and surcharge of the Trustee.

Prior to the motion here involved, the Snowshoe Company (one of the petitioners) had, by motion, dated October 13, 1987, sought authority, from the Bankruptcy Court, to sue the law firm (Steptoe & Johnson) of which the Trustee is a partner. That motion and another motion, by the Snowshoe Company, dated November 19, 1987, for the Bankruptcy Judge to disqualify himself, under 28 U.S.C. § 455, caused the Bankruptcy Judge to enter an order, in this case, on November 25, 1987, which stated:

> " *** that because of its relationship with Herbert G. Underwood, the Court is concerned about its ability to be fair and impartial when the issue before the Court involves accusations of wrongdoing by Mr. Underwood and the law firm of Steptoe & Johnson;" and "ORDERED that this Court disqualifies itself pursuant to 28 U.S.C. § 455(b);" and "FURTHER ORDERED that the Motion for Order Authorizing the Debtor, Snowshoe Company to Institute Suit against Steptoe & Johnson is referred to the Chief District Judge for the Northern District of West Virginia for disposition."

Amazingly, the Bankruptcy Judge, then, on January 13, 1988, DENIED the Snowshoe Company's November 19,1987 motion for his disqualification and continued to preside in all matters in this case.

Neither the Trustee (Michael L. Bray) nor Counsel to the Trustee (Steptoe & Johnson) filed a Response to the Snowshoe Company's motion of February 13, 1988, for the

removal and surcharge of the Trustee; and, therefore, pursuant to Local Rule 2.07(f), the Trustee was "deemed not to oppose such motion".

However, The Bankruptcy Judge, on March 29, 1988, (ignoring Local Rule 2.07(f) and his declared bias and prejudice in favor of the law firm of which the Trustee is a partner), without response from the Trustee, evidence, hearing or argument, DENIED the motion to remove and surcharge the Trustee.

The petitioners appealed the denial to the District Court on April 6, 1988. Briefs were promptly and timely filed. However, no hearing or oral argument was ever held.

Two years and seven months later, on November 30, 1990, the District Court, by MEMORANDUM and JUDGMENT ORDER, (along with final orders in two other consolidated cases), "AFFIRMED" the Bankruptcy Judge's denial of the motion to remove and surcharge trustee.

Petitioners filed a motion for amendment of judgment, a motion for rehearing and a motion for the Court to make findings of fact (petitioners presented specific facts, in numbered paragraphs, that they suggested were required to be found), on December 6, 1990. On January 25, 1991, the District Court denied those motions. The petitioners appealed to the Fourth Circuit on January 31, 1991. Oral arguments were heard in the Fourth Circuit on October 1, 1991, and a Per Curiam Unpublished Opinion, affirming, "on the reasoning of the district court", the District Court's affirmation of the Bankruptcy Judge's denial of the motion for removal and surcharge of trustee, was filed on November 13, 1991. On November 18, 1991, the **petitioners** filed a petition for rehearing, which was denied on December 16, 1991. Petitioners now seek certiorari in this case which was numbered, both, No. 91-1417 and No. 91-1431 in the Fourth Circuit and 85-75-E in the District Court.

B. Proof of the Motion allegations

As the Bankruptcy Judge ruled on the motion, here

involved, *sua sponte*, without any evidence, there is no proof directly in this case. However, the District Court and the Fourth Circuit consolidated this case with another case (certiorari in that case is, simultaneously with this case, being sought) in which the allegations are the same as in this case and proof of each of such allegations was made in that case by affidavit, exhibits and requested judicial notice (no discovery, trial or hearing was permitted in that other case).

REASONS FOR GRANTING THE WRIT

The most fundamental right that any litigant has is the right to have its case heard by an objective and impartial judge. If the judge is not objective and impartial the whole idea of "due process of law" becomes impossible. If the dice are loaded, the dice are loaded; and, the one they are loaded against has no chance.

This case is the perfect example of the results flowing from a judge with loaded dice (a bias and prejudice for the petitioners' opponent, Michael L. Bray, the Trustee).

The Bankruptcy Judge, himself, declared that the dice were loaded. By his own court order, he stated his concern about his ability to be "fair and impartial" when the issue involved accusation of wrong doing by Steptoe & Johnson; Trustee Bray's Counsel and the law firm of which he (Bray) is a partner.

Then, when the petitioners presented him with a motion involving accusation of wrongdoing by Steptoe & Johnson, the Bankruptcy Judge proved that he couldn't be "fair and impartial". He, immediately, deprived the petitioners of a day in court; he neither obtained nor required a response from Trustee Bray; he ignored his own local rules; he took no evidence; he didn't give the petitioners any opportunity to present evidence; and then, *sua sponte*, summarily threw the petitioners out of court: To the great relief, I'm sure, of Steptoe & Johnson and Michael L. Bray.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH (A) THE APPLICABLE DECISION OF THIS COURT IN *LILJEBERG V. HEALTH SERVICES CORP.*, 486 U.S. 847 (1988); AND (B) THE PROVISIONS OF 28 U.S.C. § 455.

In its decision in *Liljeberq v. Health Services Corp.*, 486 U.S. 847 (1988) this Court held that, under 28 U.S.C. § 455(a), which disqualifies a federal judge from acting in any proceeding in which the judge's impartiality "might reasonably be questioned", recusal is required--even though a federal judge lacks actual knowledge of the facts indicating the judge's interest or bias in the case - if a reasonable person knowing all the circumstances, would expect that the judge would have such knowledge.

The Fourth Circuit, in this case has approved a decision of the District Court that permits a Bankruptcy Judge to act in a proceeding where the Bankruptcy Judge, not only, (1) has actual knowledge of the facts indicating his interest or bias in the case, but, (2) has, in the case, declared, by his own court order, (a) that he is concerned about his ability to be "fair and impartial" and (b) that he is disqualified "pursuant to 28 U.S.C. § 455(b)".

Certainly, a reasonable person, with knowledge of the Bankruptcy Judge's declaration that he was concerned about his ability to be "fair and impartial" and was, therefore, "disqualified" in this proceeding, "might" reasonably question that Bankruptcy Judge's "impartiality" in this proceeding. 28 U.S.C. § 455(a).

The direct conflict between this Court's decision in *Liljeberq, supra*, and the Fourth Circuit's decision in this case is clear.

II. CERTIORARI SHOULD BE GRANTED BECAUSE A CONFLICT EXISTS BETWEEN THE FOURTH CIRCUIT AND THE THIRD CIRCUIT REGARDING THE EFFECT OF A

JUDGE'S "DISQUALIFICATION" UNDER 28 U.S.C. § 455.

The Third Circuit Court of Appeals, in its opinion in *Moody v. Simmons*, 858 F2d 137 (3rd Cir. 1988), cert. den. 489 U.S. 1078 (1989), ruled on facts alike to the facts in this case. The Third Circuit concluded, in the *Moody* case that:

> "Once a judge has disqualified himself, he or she may enter no further order in the case. *Arnold v. Eastern Airlines, Inc.*, 712 F2d 899 (4th Cir. 1983); *Stringer v. United States*, 233 F2d 947 (9th Cir. 1956). His power is limited to performing ministerial duties necessary to transfer the case to another judge (including the entering of "housekeeping orders") *In Re Cement Antitrust Litigation*, 673 F2d 1020, 102425 (9th Cir. 1982); Application of Scott,379 F Supp 622, 624 (S.D. Tex. 1974).

Id at 143.

The Fourth Circuit, in this case has approved a decision of the District Court that a Bankruptcy Judge may decide his "qualification" or "disqualification" in a proceeding on a motion by motion basis and that his declared "disqualification", in the case, when considering one motion, does not effect his ability to declare that he is "qualified" to hear a later motion in the same case.

The conflict between the Circuits is clear. Only this Court can decide which Circuit is correct and whether 28 U.S.C. § 455 is to be applied on a proceeding by proceeding basis or on a motion by motion basis.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT HAS SANCTIONED A PROCEDURE IN THE BANKRUPTCY COURT THAT (A) DEPARTS FROM THE REQUIREMENTS OF THE FIRST AMENDMENT TO THE CONSTITUTION; AND (B) CALLS FOR

THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The First Amendment to the United States Constitution, and, in particular, the right to petition the government for a redress of grievances, guarantees parties the right to have access to the courts. *Bounds v. Smith*, 430 U.S. 817 (1977). Yet, what is the good of access to the Courts to a litigant who is denied the chance to present his grievance? The First Amendment means the opportunity to have one's grievances heard. Justice, after all, is supposed to be blind, not deaf.

In this case, the petitioners were permitted to file a motion. And, that was it. Nothing further occurred. There was no response from the respondent (Trustee); there was no trial; there was no hearing; there was no opportunity to present evidence; and, there was no consideration by the Judge of the effect of his own Local Rules. Moreover, the Judge was a "disqualified" judge.

If such a procedure is permitted, then, the " rule of law" is meaningless. Everything presented to a court can be decided on the "whim" of the judge.

The petitioners were denied all rights to effectively present their grievances. They were, therefore, denied their rights under the First Amendment to the United States Constitution.

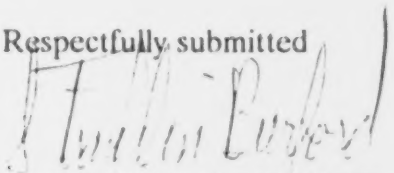
CONCLUSIONS

This Court should resolve the conflicts between the Fourth Circuit's decision in this case and (a) the decision in *Liljeberq, supra*, of this Court, and (b) the Third Circuit's decision in *Moody v. Simmons, supra.*

Also, this Court, it is submitted, should decide whether the First Amendment to the Constitution requires the bankruptcy court, when considering a motion to remove and surcharge a trustee, to grant to the movants any"right" other than the "right" to file the motion.

Dated: January 15, 1992

Respectfully submitted



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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 16, 1991

No. 91-1417
BK-85-93-C

In Re: SNOWSHOE COMPANY; JOSEPH F. BURFORD;
S. FRANKLIN BURFORD

Appellants

No. 91-1418
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

SNOWSHOE COMPANY, a West Virginia Corporation

Plaintiff - Appellant

v.

STEPTOE & JOHNSON, a Partnership

Defendant - Appellee

No. 91-1419
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

UNITED STATES OF AMERICA, by the Snowshoe Company, a corporation, S. Franklin Burford and Joseph F. Burford, parties in interset, for the use of the Snowshoe Company and its creditors and stockholders, other than those with whom Steptoe & Johnson held adverse interests; SNOWSHOE COMPANY; JOSEPH F. BURFORD; S. FRANKLIN BURFORD, in their own right

Plaintiffs-Appellants

v.

MICHAEL L. BRAY; THE TRAVELERS INDEMNITY COMPANY, a corporation

Defendants - Appellees

No. 91-1431
BK-85-93-E

In Re: SNOWSHOE COMPANY; JOSEPH F. BURFORD; S. FRANKLIN BURFORD

Appellants

No. 91-1432
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

SNOWSHOE COMPANY, a West Virginia Corporation

Plaintiff-Appellant

v.

STEPTOE & JOHNSON, a Partnership

Defendant - Appellee

No. 91-1433
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

UNITED STATES OF AMERICA, by the Snowshoe Company, a corporation, S. Franklin Burford and Joseph F. Burford, parties in interest, for the use of the Snowshoe Company and its creditors and stockholders, other than those with whom Steptoe & Johnson held adverse interests; SNOWSHOE COMPANY; JOSEPH F. BURFORD; S. FRANKLIN BURFORD, in their own right

Plaintiffs - Appellants

v.

MICHAEL L. BRAY; THE TRAVELERS INDEMNITY COMPANY, a corporation

Defendants - Appellees

No. 91-1434
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

MICHAEL L. BRAY, Trustee

Plaintiff - Appellee

v.

S. FRANKLIN BURFORD

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Appellants' filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hall, with the concurrence of Judge Ervin and Judge Phillips.

For the Court.

JOHN M. GREACEN
CLERK

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In Re: Snowshoe Company; Joseph F. Burford; S. Franklin Burford. *Appellants.*	No. 91-1417

In Re: Snowshoe Company, *Debtor.* Snowshoe Company, a West Virginia Corporation, *Plaintiff-Appellant,* v. Steptoe & Johnson, a Partnership, *Defendant-Appellee.*	No. 91-1418

In Re: Snowshoe Company,
Debtor.

United States of America, by the Snowshoe Company, a corporation, S. Franklin Burford and Joseph F. Burford, parties in interest, for the use of the Snowshoe Company and its creditors and stockholders, other than those with whom Steptoe & Johnson held adverse interests; Snowshoe Company; Joseph F. Burford; S. Franklin Burford, in their own right,
Plaintiffs-Appellants,

v.

Michael L. Bray; The Travelers Indemnity Company, a corporation,
Defendants-Appellees.

No. 91-1419

In Re: Snowshoe Company; Joseph F. Burford; S. Franklin Burford,
Appellants.

No. 91-1431

In Re: Snowshoe Company,
Debtor.

Snowshoe Company, a West Virginia Corporation,
Plaintiff-Appellant,

v.

Steptoe & Johnson, a Partnership,
Defendant-Appellee.

No. 91-1432

In Re: Snowshoe Company,
Debtor.

United States of America, by the Snowshoe Company, a corporation, S. Franklin Burford and Joseph F. Burford, parties in interest, for the use of the Snowshoe Company and its creditors and stockholders, other than those with whom Steptoe & Johnson held adverse interests; Snowshoe Company; Joseph F. Burford; S. Franklin Burford, in their own right,
Plaintiffs-Appellants,

v.

Michael L. Bray; The Travelers Indemnity Company, a corporation
Defendants-Appellees.

No. 91-1433

In Re: Snowshoe Company,
Debtor.

Michael L. Bray, Trustee,
Plaintiff-Appellee,
v.
S. Franklin Burford,
Defendant-Appellant.

No. 91-1434

Appeals from the United States District Court
for the Northern Distrist of West Virginia,at Elkins.
Robert L. Merhige, Jr., Senior District Judge.
(CA-85-75-E, CA-87-148-E, CA-88-84-E, CA-89-162-E,
BK-85-93-C)

Argued: October 1, 1991

Decided: November 13, 1991

Before ERVIN, Chief Judge, and HALL and PHILLIPS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Spicer Frankin Burford, Elkins, West Virginia, for Appellants. Martin R. Baach, NUSSBAUM & WALD, Washington, D.C., for Appellees. ON BRIEF: Jeffrey D. Robinson, Virginia A.S. Kling, NUSSBAUM & WALD, Washington, D.C.; Michael L. Bray, STEPTOE & JOHNSON, Clarksburg, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

These consolidated appeals involve two orders of the district court. Our consideration of the oral argument, the record and the district court's opinions in these cases discloses that these appeals are without merit. Accordingly, we affirm each of these orders on the reasoning of the district court. *Bray v. Burford*, No. CA-89-162-E (N.D.W. Va. Sept. 27, 1990), and *In Re: Snowshoe Co., debtor: Snowshoe Co. v. Steptoe and Johnson*, No. CA-87-148-E (N.D.W. Va. Nov. 30, 1990) (single memorandum opinion also involving consolidated cases No. CA-85-75-E and No. CA-88-84-E).

AFFIRMED

APPENDIX C

IN THE UNITED STAES DISTRICT COURT
FOR THE NORHTERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

IN RE:
SNOWSHOE COMPANY,
Debtor

SNOWSHOE COMPANY,
Plaintiff,

v.

STEPTOE & JOHNSON
of Snowshoe Company,
Defendant.

Civil Action No. 87-148-E

IN RE:

SNOWSHOE COMPANY,
Debtor.

Civil Action No. 85-75-E

IN RE:

SNOWSHOE COMPANY,
Debtor.

UNITED STATES, ex rel.
SNOWSHOE COMPANY,
Plaintiffs,

v.

MICHAEL L. BRAY, et al.,
Defendants.

Civil Action No. 88-84-E

MEMORANDUM

These are three of numerous cases arising from and related to the bankruptcy of the Snowshoe Company ("Snowshoe"). Because the issues and parties in the three cases are duplicative, they were consolidated prior to this stage of their hearing. Plaintiffs/Appellants in these matters are S. Franklin Burford and Joseph F. Burford ("the Burfords"), acting both individually and purportedly for Snowshoe and for the United States. Defendants/Appellees are Michael Bray (Bankruptcy Trustee of Snowshoe), Steptoe & Johnson (the law firm at which Bray is a partner), and Travelers Indemnity Company. These cases are before the Court on several motions and on an appeal from a Bankruptcy Court judgment. All arise from one set of facts and essentially raise the same issues.

BACKGROUND

I. Factual Background

Snowshoe Company filed for protection under Chapter 11 of the Bankruptcy Code in March 1985 and shortly thereafter for dissolution pursuant to Chapter 7. In their Cross-Motions for Summary Judgment in Case No. 87-148-E, the parties' underlying documentation and their Statements of Material Facts as to Which There is No Genuine Issue to be Tried reveal essential agreement regarding the material facts necessary to resolve all three of these proceedings.

Snowshoe owned and operated a ski resort in West Virginia. From approximately June 1977 until the present, Appellant S. Franklin Burford has owned more than 51 percent of the outstanding shares of Snowshoe. While the company was operating, he had been an officer and director personally responsible for the operations of the company.

In these three actions, the Burfords allege the same underlying theory: that the sale of Snowshoe assets occurred as a result of a scheme, forged by Trustee Michael Bray, the law

firm of Steptoe & Johnson and Shenandoah Federal Savings & Loan ("Shenandoah") to defraud the shareholders of Snowshoe by taking the ski resort from them without fair recompense. According to the Burfords, the scheme began just after June 15, 1983, when Snowshoe's shareholders unanimously rejected an offer to purchase Snowshoe's assets by Shenandoah, which was Snowshoe's principal creditor. Following that vote, on July 13, 1983, Steptoe & Johnson partner Patrick D. Deem negotiated what the Burfords refer to as a "secret" deal, on behalf of the ABAS Company which controlled 10% of the Snowshoe stock, to assist Shenandoah in acquiring the Snowshoe assets. Pursuant to this deal, Shenandoah agreed to pay ABAS approximately an additional $300,000 if a future offer were accepted by the Snowshoe stockholders. This amount would insure that ABAS would recover its initial investment for its interest in Snowshoe. On August 18, 1983, the Snowshoe stockholders voted on and rejected a second Shenandoah offer, although ABAS voted its shares in favor of the offer. Because the offer was rejected, the Shenandoah-ABAS agreement did not come to fruition and expired by its own terms on September 15, 1983.

After the bankruptcy proceedings was converted to a Chapter 7 liquidation in May 1985, the bankruptcy Court removed Burford from control of Snowshoe and appointed Michael L. Bray trustee for the Snowshoe estate. The Court also appointed Steptoe & Johnson, a law firm of which Bray is a member, counsel for the Trustee and directed Bray to operate Snowshoe until its assets could be sold to satisfy the company's debts. Prior to the appointment, Bray revealed to the Court what he saw as his only potential conflicts: representation of three creditors of Snowshoe and representation of three Snowshoe minority shareholders, including ABAS. With his law firm's permission, Bray successfully sought the permission of these clients to withdraw from representing them in Snowshoe-related matters.

In April 1985 S. Franklin Burford, on behalf of Snowshoe, filed a suit for commercial torts and fraud against

Shenandoah and two of its officers. The suit was removed from state court to this Court. In that suit Burford subpoenaed Steptoe & Johnson partner Patrick Deem for deposition, but Steptoe & Johnson subsequently moved to quash the subpena, pending determination of an issue of federal jurisdiction. The Court granted the unopposed motion. Subsequently, Bray--as Trustee of the Snowshoe estate--sold the rights to that action to Burford.

The Trustee operated the resort during the 1985-86 ski season. He appointed Danny Seme as general manager and B.J. Hungate as Seme's assistant. After interviewing eight candidates, Bray chose Seme because Seme had experience working at Snowshoe and understood its business. Both Seme and Hungate had been investors in and officers of Tory Mountain Ski Resort, a Steptoe & Johnson client that at that time was planning to develop a resort to compete with Snowshoe.

After that season, the Trustee was able to generate four bids to purchase the company's assets. The Trustee tendered the bids to the Court, without recommending any one of them. After a hearing on the bids, the Court ordered the Trustee to sell the assets to Ski Venture, Inc., a company primarily controlled by Shenandoah. The consideration for the sale was payment of $1 million by Ski Venture to Snowshoe, assumption of Showshoe's approximately $11.8 million in loans from Shenandoah, assumption of a $1.5 million loan to Bray and assumption of purchase money secured liens in the amount of $415,272.29. The total value of the consideration therefore was approximately $14.7 million. Although the Trustee argued at the hearing that the Ski Venture bid was inadequate, pursuant to the Court's order, he sold substantially all of the assets of Snowshoe to Ski Venture in October 1986.

Relying on a 1982 appraisal of Snowshoe, Burford asserts that at the time of the sale, Snowshoe's assets were valued at more than $31 million. In addition, and somewhat undercutting his point that Snowshoe assets were sold for less than their value, Burford acknowledges that on February 19,

1985, the Bankruptcy Court, in a Memorandum Opinion, found that Snowshoe's fair market value was $19 million.

From this factual background, Burford asserts that at the time of appointment of the Trustee and during these transactions, Bray and Steptoe & Johnson held undisclosed interest adverse to those of Snowshoe. These "interests" are that Bray and Steptoe & Johnson: (1) represented three minority Snowshoe shareholders in connection with their investments prior to the bankruptcy; (2) represented these same shareholders in an effort to open a competing ski resort in West Virginia; (3) moved successfully to quash the subpoena to a Steptoe & Johnson partner Patrick Deem who was to testify regarding the ABAS "secret" deal; (4) represented three creditors of Snowshoe prior to Bray's appointment as Trustee; and (5) represented Snowshoe in connection with various tort actions against it. Although Bray admits these facts, he challenges their characterization as "undisclosed interests".

Burford further argues that Trustee Bray violated the faithful performance of his duties by taking five particular actions without revealing his "conflicts": Bray (1) hired Seme and Hungate, who were involved in the effort to open a competing ski resort, to work for Snowshoe during the 1986-86 season; (2) abandoned a legal claim against Shenandoah; (3) sold Snowshoe assets to Ski Venture substantially below their market value; (4) collected fees and expenses for services performed by the Trustee and his law firm; and (5) operated the resort at a loss of more than $4 million during the 1985-86 season. Again, Bray admits these actions, but asserts that none breached his fiduciary duties to Snowshoe.

II. Procedural Background

The somewhat torturous procedural history of these actions can be reviewed in brief. On July 9, 1987, Burford filed a civil RICO action against Steptoe & Johnson in District Court in Charleston, his first action arising from his allegation that the Trustee had acted improperly. The Court in this action granted

the defendant's motion to dismiss for failure to state a cause of action on February 1, 1988. This action was the forerunner of the three actions now before this Court, which essentially also charge that Bray and Steptoe & Johnson schemed to defraud the shareholders of Snowshoe.

The first two of the three actions, though several years old, have not progressed beyond early stages of litigation. On October 13, 1987, in the first of these actions, No. 87-148-E, Burford filed a Motion for Authorization to Sue Steptoe & Johnson on behalf of Snowshoe. Steptoe & Johnson, in June 1988, filed a Motion to Stay Proceedings in this action pending resolution of No. 88-84-E (discussed below). Burford in the second of these matters, No. 88-84-E, filed an adversary proceeding on behalf of himself, his brother Joseph F. Burford, and purportedly on behalf of Snowshoe and the United States, against Trustee Bray and the Trustee's bonding company. This action, filed June 8, 1988, aims to surcharge the trustee for alleged breach of fiduciary duties and to recover on bond from his bonding company.

In the third of these actions, No. 85-75-E (REOPENED), Burford and the other Plaintiffs/Appellants are appealing the Bankruptcy Court's denial of their Motion to Remove and Surcharge Trustee of the Snowshoe Estate Bray (the "bankruptcy appeal"). In denying this motion the Bankruptcy Court made various findings: (1) that the motion mistakenly represents that Burford is Snowshoe's attorney; (2) that the motion contains substantially the same facts as at issue in the Motion for Authorization to Sue, case No. 87-148 and therefore is duplicative; (3) that the Burford's earlier brought suit in the Southern District of West Virginia based on the same facts and conclusions set forth in this action; (4) that none of the other 200 creditors have moved for removal of the Trustee; (5) that removal of the Trustee at this date would prejudice the interests of the other creditors and would cause the estate needless expense; and (6) that the accusations do not relate to the honesty and integrity of the Trustee, but rather to the alleged bad acts of the Trustee against the Burfords. After the

Bankruptcy Court entered its Order on April 6, 1988, the Burfords timely appealed. The Appellees filed a motion to stay the appeal pending resolution of case No. 88-84-E, at which time this Court consolidated the actions.

By an Order entered September 20, 1989, the Court consolidated the three actions, which are now the subject of this Memorandum. The consolidation occurred because all three actions similarly challenge the conduct of the Trustee and his law firm aiming to remove the Trustee from his office and to recover damages on behalf of Snowshoe and the Burfords from Trustee Bray personally and from Bray's bonding company. In the September 20 Order, the Court also instructed the parties to brief the Court on two issues: (1) standing of the Plaintiffs/Appellants to bring the above referenced actions; and (2) challenges to the conduct of the Trustee in the underlying bankruptcy matter pursuant to 11 U.S.C. § 324. This Memorandum addresses those issues as well as outstanding Motions for Summary Judgment.

DISCUSSION

I. Standing

At the outset of examination of these cases, the question most troubling to the Court is whether Burford has standing to bring these three actions and if he does have standing in what capacity does he come before the Court. The Court will examine standing in each suit.

A. Motion for Authorization to Sue

In Case No. 87-148-E, Burford has filed a motion in the Snowshoe bankruptcy proceedings asking the court for leave to file a complaint on behalf of the Snowshoe Company against Steptoe & Johnson. On behalf of Snowshoe, Burford seeks to have a determination that the actions of the Trustee and others constitute a pattern of racketeering in violation of the civil RICO statute. Burford also alleges fraud and tortious interference with business relationships.

Whether Burford has standing to bring this action

depends, at least in part, on the scope of the authority of the bankruptcy Trustee. If Burford's attempt to file suit impinges on the unique authority of the Trustee, this Court cannot authorize him to bring suit on behalf of Snowshoe. Section 323 of the Bankruptcy Code, 11 U.S.C. § 323, names the bankruptcy trustee "the representative of the estate" who "has the capacity to sue and be sued." After the estate is created, although title does not vest in the Trustee himself, the Trustee is the individual through whom the estate acts. See 4 Collier on Bankruptcy para. 541.10[8] (15th ed. 1987). Accordingly, if Burford's proposed suit is property of the estate, the bankruptcy Trustee, not Burford, should decide whether or not filing the action is in the best interest of the estate. See Matter of Sinder, 102 B.R. 987 (Bankr. S.D. Ohio 1989).

Commencement of the bankruptcy case creates the estate. See 11 U.S.C. § 541(a). This estates is comprised of property that includes "all legal or equitable interests of the debtor in property as of the commencement of the case," as well as "[a]ny interest in property that the estate acquires after the commencement of the estate." *Id.* The estate therefore includes pending legal actions and potential legal actions.

In this motion, Burford turns to the Court for authorization to initiate a legal action on behalf of Snowshoe. A decision regarding whether Snowshoe should pursue a claim against Steptoe & Johnson, however, appropriately lies with bankruptcy Trustee Bray because that legal action constitutes property a part of the bankruptcy estate. Although Burford argues that Bray is an interested party concerning a decision whether to sue his own law firm, Burford's remedy does not lie in his personally usurping the power of the Trustee. Rather, should the circumstances arise, Burford may, as he has in Case No. 88-84-E, raise a question regarding the priority of the actions of the Trustee and consequently seek removal of the Trustee. See 11 U.S.C. § 324. Should Burford succeed in any such effort to remove the Trustee, then the successor Trustee would have authority to pursue an action against Steptoe & Johnson on behalf of Snowshoe. See *In re San Juan Hotel*

Corp., 847 F.2d 931, 936-37 (1st Cir. 1988).

This Court thus concludes that Burford does not have standing to sue Steptoe & Johnson on behalf of Snowshoe. As a consequence of this fact, Burford does not have standing to pursue this action, and the Court must and will dismiss Burford's motion for authorization to sue, Case No. 87-148-E.

B. Complaint for Surcharge of Trustee and Recovery on Bond

In Case No. 88-84-E, S. Franklin Burford has filed a motion seeking to surcharge the Trustee and to recover on his bond "for the use of Snowshoe Company and its creditors and stockholder," and for Snowshoe, Joseph F. Burford and himself personally. In so far as Burford purports to represent Snowshoe or the Snowshoe estate, particularly in Counts I and IV of the Complaint, for the reasons discussed above in reference to Case No. 87-148-E, this Court finds that Burford does not have standing and, to that extent, will dismiss the motion. The Complaint in this action indicates that Burford and his brother, Joseph F. Burford also are plaintiffs in their own right.

To the extent the Burfords personally seek recompense, the issue arises whether a stockholder/creditor of a debtor may bring an action seeking surcharge and removal of the Trustee of the debtor's estate (and recovery from the Trustee's bonding company). It is well-settled bankruptcy law that a Trustee may be held personally liable for a breach of his fiduciary duties. See *Mosser v. Darrow*, 341 U.S. 267 (1951); *In re Gorski*, 766 F.2d 723, 727 (2d Cir. 1985). Burford brings Counts II and III of this action as a personal stockholder/creditor of Snowshoe and the Snowshoe estate as well as on behalf of Joseph F. Burford who is in the same position. As such, he does have standing to sue Trustee Bray for the alleged fiduciary breach to recover damages that he and Joseph F. Burford have incurred. In Counts II and III of the complaint, the two plaintiffs seek damages for the alleged loss in the value of their Snowshoe stock due to Bray's actions that allegedly breached his fiduciary duties. The Burfords also seek removal of the Trustee. Resolution of these claims coincide substantively and will be

discussed below in reference to outstanding motions for summary judgment.

C. The Bankruptcy Appeal

In Case No. 85-75-E Burford appeals the Bankruptcy Court's denial of his Motion to Remove and Surcharge the Bankruptcy Trustee. Again, Burford filed this motion, like that in the former case, on behalf of the Snowshoe Company, Joseph F. Burford and himself personally; this motion was purportedly filed for the benefit of the estate. For the reasons discussed above and similar to the disposition of standing in those cases, Burford does not have authority to bring this action as a representative of Snowshoe or the Snowshoe estate. Again, for the reasons discussed above, to the extent the Burfords personally seek recompense, they may proceed with this action and this appeal.

II. Summary Judgment in Case No. 88-84-E

In Case No. 88-84-E, the Court has determined that the Burfords have standing to sue personally, and if appropriate, to recover damages from Bray for any breach of his fiduciary duty and to cause removal of Bray and appointment of an independent Trustee pursuant to 11 U.S.C. § 324. Both parties have moved for summary judgment in their favor on these issues, which they have fully briefed. Federal Rule of Civil Procedure 56 governs motions for summary judgment. Pursuant to Rule 56, summary judgment is appropriate only where parties do not dispute material facts that might affect the outcome of an action. See *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 (1986). To defeat summary judgment, a nonmoving party, who will bear the burden of proof at trial on a dispositive issue, must go beyond his or her pleadings with affidavits, depositions, interrogatories or other evidence to show specific facts that amount to a genuine issue for trial. *Celotex Corp. v. Catrett*. 477 U.S. 317, 324 (1985). Whether summary judgment is appropriate therefore turns on whether facts material to the issue at hand are in dispute.

A. The Law of Trustee Removal and Creditor Recovery

Pursuant to 11 U.S.C. § 324, the Court may remove a bankruptcy Trustee for cause after notice and a hearing. Section 324 proceedings may be commenced by complaints of creditors, the application of any party in interest or by the Court on its own initiative. See 2 Collier on Bankruptcy para. 324.01 (15th ed. 1987). Accordingly, Burford's complaints are sufficient to initiate such proceedings. Under Section 324, a court may remove a Trustee for a variety of reasons including for failure to perform his duties, for violations of his fiduciary duties, and for holding an interest adverse to the general interests of the estate. To succeed in a Motion to Remove, the petitioner must show "actual fraud or harm to the estate." *In re Hartley*, 50 B.R. 852, 854 (Bankr. N.D. Ohio 1985); see *In re Woodmar Realty Co.*, 294 F.2d 785 (7th Cir. 1961); *In re Haugen Constr. Serv., Inc.*, 104 B.R. 233 (Bankr. D.N.D. 1989).

In addition, a Trustee may be held personally liable for a breach of his fiduciary duties. See *Mosser v. Darrow*, 341 U.S. 267 (1951). The liability may arise due to the intentional, knowing, or negligent acts of the Trustee. See *In re Gorski*, 766 F.2d 723, 727 (2d Cir. 1985); *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1357 (9th Cir. 1983). And, the liability may be imposed either for the benefit of the estate in the form of a surcharge (to benefit creditors who have been injured by the Trustee's acts) or for the benefit of a creditor in the form of damages in a direct action against the Trustee. See *In re San Juan Hotel Corp.*, 847 F.2d 931, 938 (1st Cir. 1988).

B. Application of the Law

The Burfords assert three grounds for surcharging the Trustee, recovering on bond and removing the Trustee: (1) the Trustee willfully acted to the detriment of the Snowshoe estate; (2) the Trustee worked under actual, undisclosed conflicts of interests to the detriment of the Snowshoe estate; and (3) the Trustee's actions and conflicts were the part of an alleged conspiracy with Shenandoah to transfer the assets of Snowshoe absent fair compensation to the plaintiffs. The Court will analyze the evidence underlying each of these three claims. Defendants assert and display that factual disputes exist

regarding several of the allegations underlying these claims and regarding the Burfords' characterization of actions as in breach of fiduciary duties. See Affidavit of Michael L. Bray (July 19, 1988). Because of these disputes, the Burfords' Motion for Summary Judgment cannot be granted. Bray's Cross-Motion for Summary Judgment, however, relies on the undisputed facts, as outlines above, and the Burfords have failed to present a genuine factual dispute relevant to the resolution of the cross-motion. As a matter of law, summary judgment is therefore appropriate.

1. Willful Breach of Fiduciary Duties

The Burfords argue that with six actions, Bray deliberately violated his obligation to perform his duties as Trustee in good faith: (1) "Abandoning" a claim against Shenandoah; (2) Selling Snowshoe assets to Ski Venture for less than their value; (3) Collecting fees and expenses for Trustee services; (4) Operating Snowshoe at a loss for the 1985-86 ski season; (5) Hiring Seme as Snowshoe General Manager; and (6) Hiring Hungate as Snowshoe Assistant Manager.

a. Court Authorized Actions

Defendants argue that Bray cannot be held liable or removed from his position as Trustee due to his actions that the Court specifically authorized. The general rule is that " '[r]eceivers and trustees appointed to conduct business on behalf of an estate in reorganization are . . . only liable as receivers and trustees. The are not individually liable unless they act outside their authority.' " *United States v. Sapp*, 641 F. 2d 182, 184 (4th Cir. 1981) (quoting 11 Remington on Bankruptcy § 4507 (1961)). Acts of trustees that are judicially approved are explicitly within their authority. In *Bouillon v. McClanahan*, 639 F.2d 213 (5th Cir. Unit A 1981), the Fifth Circuit explained that this rule derives from the immunity of judges for actions taken within their judicial discretion. The circuit court held that where the Trustee, "as an arm of the Court, sought and obtained Court approval of his actions, he is entitled to derived immunity." *Id.* at 214. Thus where a Court directly orders a Trustee's action, the Trustee acts with immunity. In the absence

of a specific court order, however, a factual dispute may exist regarding whether the Trustee acted within the bounds of his or her authority. See *Yadkin Valley Bank & Trust Co. v. McGee*, 819 F.2d 74, 76 (4th Cir. 1987).

Several of the six actions that Plaintiffs allege Bray took injuring the Snowshoe estate were specifically authorized by the court below. Bray may not, as the Court has stated, be held liable for these actions. First, Plaintiffs complain that Bray "abandoned" a legitimate claim against Shenandoah. This characterization misconstrues undisputed facts. The Snowshoe action against Shenandoah was first filed prior to the appointment of Bray as bankruptcy trustee. Upon his appointment, Bray reviewed the case, filed an opposition to Shenandoah's outstanding Motion to Dismiss and, after significant discovery including the deposition of two witnesses, determined that Snowshoe should abandon the suit. Bray then filed a Motion to Abandon, but prior to a hearing on that motion agreed to sell the suit to Burford for $5,000 and a 50% interest in any future recovery. Although Shenandoah opposed the sale (and Bray's Motion to Withdraw the Motion to Abandon), the Court granted Bray leave to sell the claim to Burford. Although the Court did not order Bray to sell the claim to Burford, the Court explicitly sanctioned the sale. Because the Court approved of the sale terms as in the best interests of the estate, finding that Bray breached a fiduciary duty by selling the claim would not only render a court's order ineffective, but also would compound such an intolerable result by discouraging trustees from respecting the judgment of the Court and encouraging them to join the many second-guessers of court decisions. The potency of a court order remains static in the absence of a ruling by a superior court. Therefore, as a matter of law, Trustee Bray is immune from liability arising from the sale of the Snowshoe claim against Shenandoah.

Second, the Burfords assert that Bray sold Snowshoe assets to Ski Venture for less than their fair value. This action, no less than the purported abandonment of the claim against Shenandoah, occurred at the behest of the Court. As Trustee

of Snowshoe, the Bankruptcy Court requested Bray to solicit bids for the company's assets. Bray tendered to the court no less than four bids on the property to the court, including the bid by Ski Venture which the court accepted. Although Bray objected to acceptance of this bid, he followed the direct order of the court in selling the assets to Ski Venture. Had he refused, Bray would have faced potential charges of contempt of court for disregarding the order of the court. This Court should not and will not sanction Trustee Bray for his reasonable and diligent carrying out of court orders.

Third, Plaintiffs contend that Defendant abused his authority by collecting fees and expenses from Snowshoe for Trustee services. Over the course of his tenure as Trustee, Bray submitted three applications to the Court for fees. The Burfords did not object to the first and second applications, submitted respectively in April 1986 and September 1986, and the court summarily approved them. Trustee Bray submitted the third application in January 1988 and a hearing was conducted the following month. At the hearing the court denied the Burfords' objection and granted the application. Because the court reviewed each of these applications and granted them, Bray's taking of these fees was specifically authorized. The granting of fees to individuals who take on the often arduous task of acting as bankruptcy trustees is an obvious necessity as long as courts wish to encourage competent individuals to take such positions. Where a court reviews consequent fee applications, finds them reasonable and grants them, this Court generally will not find a breach of fiduciary duty due to a Trustee's having asked for what appear to the court below to be reasonable fees. Perhaps, in a unique case, such as where a trustee has knowledge that the court below lacks, a breach of fiduciary duty may occur due to the acceptance of a fee request. This, however, is not such a case. Therefore, this Court finds that Trustee Bray did not breach a fiduciary duty by accepting fees for his services.

Fourth, Bray operated Snowshoe at a loss for the 1985-86 ski season. Two weeks after he was appointed Snowshoe

Trustee, Bray reported to the Bankruptcy Court that he could sell Snowshoe assets immediately or continue operating the resort through the ski season, hoping to attract a better offer. Trustee Bray advised the court that there was no guarantee that Snowshoe would break even if it operated through the winter, and the Trustee recognized that "from an accounting standpoint, skiing operations cannot be run profitably because of the interest accrual on debt associated with real estate development." The court nonetheless instructed Bray to operate Snowshoe through the season. The parties do not dispute that Snowshoe accrued a loss during this operating season, yet neither attributes this loss to other than normal business operations. The Burfords do not allege that Bray operated Snowshoe in a frivolous or incompetent manner or that Bray failed to give the operation due concern and attention. Thus, it is undisputed that Bray diligently followed the order of the court and Snowshoe happened to suffer a consequent loss, an outcome that the court necessarily considered when it ordered Bray to operate the ski resort during the 1985-86 season. As above, the Trustee's following the instructions of the court does not amount to a breach of any fiduciary duty of care to Snowshoe or to its stockholders.

b. Deliberate Violation of Duty Requirement

The final two actions that the Burfords contend violated Bray's fiduciary duty to Snowshoe were the hiring of Seme as Snowshoe General Manager and the hiring of Hungate as Snowshoe Assistant Manager. The Bankruptcy Code specifically authorizes a trustee of an operating debtor to make personnel decisions for the debtor absent court order. See 11 U.S.C. § 327(b). Like other acts of the trustee, such personnel decisions will give rise to personal liability of the trustee only where the trustee takes them in the willful and deliberate violation of his duties. See *United States v. Sapp*, 641 F.2d 182, 184-85 (4th Cir. 1981) ("[I]t is well settled that the trustee may not be held liable for any mistake of judgment; . . . his liability personally is 'only for acts determined to be willful and deliberate in violation of his duties.'").

Burford offers no evidence that Bray deliberately acted to violate his duties to Snowshoe. Burford assumes that because Seme and Hungate held an interest in a competing business venture their appointment violated Bray's duties. This simply is not so. In fact, that the two appointed managers were involved in other ski resort ventures underscores their experience in the field. Bray extensively interviewed candidates for the general manager's position and determined that Seme was the best qualified candidate. Seme's appointment was announced in open court absent a voiced objection and his contract was comparable to that of his predecessor. Moreso, Bray formally applied to the court for permission to hire Hungate. Burford cannot reasonably contend that the decisions to hire these two managers amounted to a deliberated violation of Bray's duties to Snowshoe. In fact, Burford fails even to demonstrate that the appointments were poor business judgment. This Court thus concludes that these actions, like the other four actions that Burford emphasizes, did not amount to a breach of Bray's fiduciary duties.

The Court thus will grant summary judgment in the favor of Defendants on issues regarding Bray's alleged breach of fiduciary duties.

2. Conflicts of Interest

The Burfords argue that Bray should be surcharged and removed as trustee because he has labored under a series of undisclosed conflicts of interest to the detriment of the Snowshoe estate. These purported conflicts include: (1) representation by the Trustee and his law firm of the ABAS group in connection with their minority investment in Snowshoe and with their investment in another proposed ski resort; (2) the Trustee's motion to quash the subpoena of Patrick Deem to testify in connection with Snowshoe's litigation against Shenandoah; (3) representation by the Trustee of three Snowshoe creditors prior to his appointment; and (4) representation by the Trustee's law firm of Snowshoe in several tort actions prior to the bankruptcy.

It is well-settled bankruptcy law that trustees may not

operate where they hold interests adverse to that of an estate. *Mosser v. Darrow*, 241 U.S. 367, 271 (1951). To disable a trustee's legitimate right to act, a conflict must, however, be actual and not simply the result of a formal relationship. In the absence of fraud and injury to the debtor's interests, potential conflicts are insufficient to remove a trustee. See *In re Freeport Italian Bakery, Inc.*, 340 F.2d 50, 54-55 (2d Cir. 1965). In addition, where a potential conflict may be grounds for removal, a party will be estopped from removing a trustee where the party knew of the conflict and failed to object over a sustained period of time. See *In re National Pub. Serv. Corp.*, 68 F. 2d 859 (2d Cir. 1934), cert. denied, 292 U.S. 641 (1934): *In re Miller*, 50 B.R. 870, 873 (Bankr. N.D. Ohio 1985).

The Burfords first contend that Bray and Steptoe & Johnson's representation of ABAS constituted a sanctionable conflict of interest. Despite vigorous objection to this relationship, the Burfords do not allege that Bray or his law firm dealt with ABAS after 1983, do not allege that any action--including the sale of Snowshoe assets to Ski Venture--bestowed a benefit on these shareholders, and do not allege that the relationship was injurious to the Snowshoe estate. The relationship may amount to a potential conflict between Bray and the estate. Yet, the Burfords were aware of the relationship from its inception in 1981 and Bray offered it to the court prior to his acceptance of the Trusteeship. In the absence of a showing of injury to the estate or even an undisclosed conflict with the interests of the estate, this Court concludes that the undisputed evidence demonstrates that the potential conflict did not mature into an actual conflict and did not demand the trustee's removal.

Second, the Burfords argue that the Trustee's submission of a motion to quash the subpoena of Patrick Deem in connection with Snowshoe's litigation against Shenandoah evinced a conflict of interest. Although the Burfords' submissions to this Court consistently ignore the fact, Bray's Motion to Quash the subpoena was founded on an inquiry regarding the court's jurisdiction to hear the Snowshoe-

Shenandoah action. Bray intended to delay the deposition only until settling the jurisdictional question. This reasonable action by Bray, well known to the Burfords prior to Bray's appointment, simply does not amount to a conflict of interest justifying removal.

Third, the Burfords assert that representation by the Trustee of three Snowshoe creditors prior to his appointment amounted to a conflict of interest. Bray, however, revealed this situation to the court at the time of his appointment and, upon the court's instruction, successfully sought the permission of these clients to withdraw from their representation. Although this representation could have matured into an actual conflict, Bray's withdrawal apparently averted that possibility. Moreover, the Burfords offer neither evidence nor allegation that this relationship in any way damaged the estate; the evidence fails even to suggest that Bray, in his role as Trustee, addressed the claims of his former clients. As such, the potential conflict did not amount to an actual conflict demanding removal of the Trustee.

Finally, the Burfords argue that Steptoe & Johnson's representation of Snowshoe in several tort actions prior to the bankruptcy created a conflict of interest. Plaintiffs do not allege that because of this representation Steptoe & Johnson is a creditor of the estate and do not allege that the relationship in any way adversely affected the estate. In short, the Burfords fail to explain how this prior representation amounts to a conflict of interest or how it may have adversely affected Bray's actions. In addition, at the time of Bray's appointment, the Burfords were aware of Bray's earlier representation of Snowshoe and failed to complain of what they now see as a detrimental conflict of interest. The Court thus concludes that this potential conflict of interest, like the others alleged, did not flare into a situation requiring the removal of the Trustee.

The Court thus will grant summary judgment in favor of Defendants on issues regarding Bray's alleged conflicts of interest.

3. The Alleged Conspiracy

Finally, Burford asserts that the Trustee's actions were a part of an alleged conspiracy with Shenandoah to transfer the assets of Snowshoe to Shenandoah absent fair compensation to the plaintiffs. The evidence adduced for this Motion for Summary Judgment, however, fails to provide a basis for this allegation. Throughout the course of briefing these consolidated motions, the Burfords have failed to point out a single fact that suggests a conspiracy exists between the Trustee and Shenandoah. The Burfords summarily conclude that a conspiracy--a secret deal--existed primarily based on the price that Ski Venture paid for Snowshoe assets and on Bray's representation of minority Snowshoe shareholders in connection with the 1983 attempted sale of Snowshoe to Shenandoah.

As demonstrated above, neither of these two actions amounted to a breach of fiduciary duty. Notably, Bray openly and vocally opposed the sale to Ski Venture; he only completed it on direct order of the court. In addition, the 1983 representation of ABAS in no way aided Shenandoah's attempt to gain control of Snowshoe. The 1983 representation, in fact, aimed to maximize payment to ABAS from Shenandoah, squarely in conflict with Shenandoah's interest. The Burfords also fail to assert any manner in which this former representation may have affected the 1986 sale of Snowshoe assets to Ski Venture. These actions therefore fail in any way to evidence a conspiracy between Bray and Shenandoah.

The other undisputed evidence submitted for consideration on this Motion for Summary Judgment affirmatively suggests that no conspiracy existed to transfer Snowshoe assets to Shenandoah. Throughout his administration of the estate, Bray opposed Shenandoah's interests. Bray opposed the sale of assets to Ski Venture, in which Shenandoah holds a majority interest. Bray litigated Snowshoe's claim against Shenandoah, and, rather than abandon the claim, Bray sold the claim to Burford so that the suit would continue. Based on these undisputed facts, this Court therefore concludes that a trier of fact could not infer the existence of a conspiracy between Bray and Shenandoah. The Burford's action against

Bray for conspiracy thus must fail and this Court will grant summary judgment in favor of defendants on issues related to the alleged conspiracy.

III. The Bankruptcy Appeal

In Case No. 85-75-E (REOPENED), the Burfords appeal the decision of the Bankruptcy Court issued April 6, 1988, denying their Motion to Remove and Surcharge the Trustee. The motion was grounded on the exact same allegations of fraud and improper conduct as the Motion for Authorization to Sue (case No. 87-148-E) and the Complaint for Surcharge and Recovery on Bond (Case No. 88-84-E). The Bankruptcy Court denied the motion without reaching the merits of the allegations of fraud and misrepresentation, resting its decision on procedural grounds: that the issue was already raised in another of these consolidated cases (No. 87-148-E), that the issue already had been litigated and that removal at this time would prejudice the interests of other creditors.

Because this Court has analyzed the merits of this Motion in the preceding disposal of the Cross-Motions for Summary Judgment, it need not again address the issues. For purposes of this appeal, the Summary Judgment granted Bray in Case No. 88-84-E confirms that the Bankruptcy Court's dismissal of this action should be affirmed if for no other reasons on *res judicata* grounds. See *Turshan v. Chapman*, 823 F.2d 836, 839 (4th Cir. 1987).

CONCLUSION

For the reasons stated herein, this Court will: (1) dismiss the Motion for Authorization to Sue (Case No. 87-148-E) for lack of standing; (2) grant summary judgment in favor of Trustee Bray in the action entitled Complaint for Surcharge and Recovery on Bond (Case No. 88-84-E); and affirm the Bankruptcy Court's dismissal of the Motion for Surcharge (Case No. 85-75-E (RE-OPENED). These cases have run their due course and are, unless deemed otherwise by a superior court,

concluded.

An appropriate Order will issue.

Robert A. Merhige
UNITED STATES DISTRICT JUDGE

Date November 30, 1990

APPENDIX D

IN THE UNITED STAES DISTRICT COURT
FOR THE NORHTERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

IN RE: SNOWSHOE COMPANY, *Debtor* SNOWSHOE COMPANY, *Plaintiff,* v. STEPTOE & JOHNSON of Snowshoe Company, *Defendant.*	Civil Action No. 87-148-E
IN RE: SNOWSHOE COMPANY, *Debtor.*	Civil Action No. 85-75-E
IN RE: SNOWSHOE COMPANY, *Debtor.* UNITED STATES, ex rel. SNOWSHOE COMPANY, *Plaintiffs,* v. MICHAEL L. BRAY, et al., *Defendants.*	Civil Action No. 88-84-E

JUDGMENT ORDER

For the reasons stated in the Memorandum this day filed, and deeming it just and proper, it is hereby ORDERED and ADJUDGED:

Plaintiffs' Motion for Authorization to Sue, Case No. 87-148-E, is DISMISSED for lack of standing.

Defendant's Cross Motion for Summary Judgment, Case No. 88-84-E (entitled Complaint for Surcharge and Recovery on Bond), is GRANTED, and Plaintiffs' Motion for Summary Judgment is DENIED.

The Bankruptcy Court's dismissal of the Motion for Surcharge, Case No. 85-75-E (RE-OPENED), is AFFIRMED.

Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel of record.

Robert A. Merhige
UNITED STATES DISTRICT JUDGE

Date November 30, 1990

APPENDIX E

IN THE UNITED STAES DISTRICT COURT
FOR THE NORHTERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

IN RE: SNOWSHOE COMPANY, *Debtor* SNOWSHOE COMPANY, *Plaintiff,* v. STEPTOE & JOHNSON of Snowshoe Company, *Defendant.*	Civil Action No. 87-148-E
IN RE: SNOWSHOE COMPANY, *Debtor.*	Civil Action No. 85-75-E
IN RE: SNOWSHOE COMPANY, *Debtor.* UNITED STATES, ex rel. SNOWSHOE COMPANY, *Plaintiffs,* v. MICHAEL L. BRAY, et al., *Defendants.*	Civil Action No. 88-84-E

MEMORANDUM

This action is before the Court on Plaintiff/Appellant S. Franklin Burford's Motion for Amendment of Judgment, Motion for Rehearing, and Motion for Findings of Fact. After due consideration, this Court finds these without merit and therefore will deny them.

DISCUSSION

The relevant factual background to this matter is included in the Court's Memorandum filed November 30, 1990. This Court, in that Memorandum and Order issued the same day, addressed numerous outstanding issues in these three consolidated cases. The disposition of these motions and appeals purported to be a final judgment in these cases. The two motions now before the Court essentially request that the Court re-open the case to review the November 30 decision for error. Burford argues both that this Court erred in its substantive determinations and that the case should be re-opened for factual development.

Burford contends that this Court should amend its judgment Order issued November 30, 1990. He primarily puts forward one argument, criticizing this Court's decision in Case No. 87-148-E. In reviewing that case , this Court decided that Burford may not be authorized to pursue a suit on behalf of the debtor Snowshoe Company against Bankruptcy Trustee Michael Bray and Bray's law firm, Steptoe & Johnson. Rather, this Court explained, the appropriate manner for a dissatisfied stockholder to proceed is to attempt to remove a bankruptcy trustee who fails to adequately pursue his or her duties.

Burford asserts that the decision in *In re Ira Haupt & Co.*, 398 F.2d 607 (2nd Cir. 1968), establishes that Bray's actions should lead to Burford's authorization to sue. Burford had ample opportunity--of which he availed himself--to argue the applicability of *Haupt* (which is a 1968 decision) prior to this

Court's earlier decision. In addition, the decision in *Haupt* does little to aid Burford's position. In *Haupt*, the Second Circuit held that it was improper for a bankruptcy trustee to fail to pursue or sell a potential claim of the bankrupt. *Id.* at 613. Burford's request to file suit on behalf of Snowshoe does not involve any such malfeasance on the part of Trustee Bray, involving failure to pursue pre-petition claims of the bankrupt. Accordingly, this argument does not necessitate a re-opening of this suit and this Court will deny Burford's Motion for Amendment of Judgment and for Rehearing.

Second, Burford moves this Court to re-open this case for additional fact finding. Burford's motion to enter findings of fact recovers area that this Court already has carefully perused. The motion essentially requests that the Court reconsider the conclusions that it reached in and upon which it predicated the November 30, 1990, Memorandum and Order. Burford offers no actual basis for reconsideration of the factual conclusions that this Court reached upon review of the undisputed documentary evidence. As a result, Burford's request to re-open this action for further factual development is without merit and, accordingly, will be denied.

An appropriate Order will issue.

Robert A. Merhige
UNITED STATES DISTRICT JUDGE

Date January 25, 1991

APPENDIX F

IN THE UNITED STAES DISTRICT COURT
FOR THE NORHTERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

IN RE: SNOWSHOE COMPANY, *Debtor* SNOWSHOE COMPANY, *Plaintiff,* v. STEPTOE & JOHNSON of Snowshoe Company, *Defendant.*	Civil Action No. 87-148-E
IN RE: SNOWSHOE COMPANY, *Debtor.*	Civil Action No. 85-75-E
IN RE: SNOWSHOE COMPANY, *Debtor.* UNITED STATES, ex rel. SNOWSHOE COMPANY, *Plaintiffs,* v. MICHAEL L. BRAY, et al., *Defendants.*	Civil Action No. 88-84-E

ORDER

For the reasons stated in the Memorandum this day filed and deeming it just and proper, it is hereby ORDERED and ADJUDGED:

Plaintiff/Appellants' Motion for Amendment of Judgment and Motion for Findings of Fact is DENIED.

Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel of record.

Robert A. Merhige
UNITED STATES DISTRICT JUDGE

Date January 25, 1991

APPENDIX G

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE	§	
	§	
SNOWSHOE COMPANY	§	BK NO. 85-00093-C
	§	
Debtor	§	

MEMORANDUM ORDER ON THE MOTION TO
REMOVE AND SURCHARGE TRUSTEE

On the 16th day of February, 1988, S. Franklin Burford, as attorney for the Snowshoe Company, S. Franklin Burford, and Joseph F. Burford moved this Court for removal and surcharge of the trustee. This motion id DENIED on its face and from the record for the following reasons:

1. Initially, the Court notes that the Snowshoe Company is represented by the Trustee, Michael L. Bray, not S. Franklin Burford. This motion mistakenly represents that S. Franklin Burford is the attorney for Snowshoe Company.

2. The Trustee for Snowshoe Company, Michael L. Bray, was appointed by The Honorable Robert E. Maxwell, Chief Judge for the United States District Court for the Northern District of West Virginia on the 24th day of May, 1985.

3. The Trustee, under the purview of the District Court, operated the Snowshoe Resort as an operating Chapter 7 until its sale in the fall of 1986, at which time the District Court approved the transfer of substantially all of the assets of Snowshoe Company to Ski Venture, Inc.

4. In this same bankruptcy (i.e., BK No. 85-00093-C), S. Franklin Burford and Joseph F. Burford have filed a motion to institute suit against Michael L. Bray and Steptoe & Johnson,

which motion has been transferred to the District Court by reason of my recusal. (I have recused myself where allegations of wrongdoing have been made against Steptoe & Johnson due to my prior association with Herbert G. Underwood, a partner in that firm.) The complaint attached to the Motion to Sue, now pending in the District Court, contains substantially the same facts alleged in the "Motion to Remove and Surcharge Trustee". All monetary charges against the Trustee are set forth in the aforesaid complaint. The complaint against the Trustee contains four counts. Count 1 is an allegation of violation of 18 U.S.C. §§ 1962(c) and 1964(c) (RICO). Count 2 is an allegation of a violation of 18 U.S.C. §§ 1964(d) and 1964(c) (RICO). Count 3 is an allegation of fraud, concealment, and conspiracy. Count 4 is an allegation of tortious interference. This thirty-page complaint not only describes substantially all the same factual situations set forth in the "Motion to Remove and Surcharge Trustee", but also demands damages in the amount of $94,500,000. Therefore, the "surcharge" part of the "Motion to Remove and Surcharge Trustee" is already pending before the District Court.

5. Previous to the filing of this motion, S. Franklin Burford and Joseph F. Burford instituted a suit against Michael L. Bray and Steptoe & Johnson [S. Franklin Burford and Joseph F. Burford, plaintiffs, v. Steptoe & Johnson, a partnership, and Snowshoe Company, a West Virginia corporation, Civil Action No. 2:87-0775] in the District Court for the Southern District of West Virginia on charges of violation of "RICO". Many of the "RICO" allegations were based upon the same facts and conclusions set forth in the "Motion to Remove and Surcharge Trustee". This suit has been dismissed on the pleadings by the District Court for the Southern District of West Virginia.

6. There are approximately 200 creditors in the Snowshoe Company case. No other creditors have moved for a new trustee.

7. The Trustee is appointed to act on behalf of the estate. Bankruptcy Code § 323. His duties are set forth in § 704, and generally involve the collection and reduction to

money the property of the estate. Except for some pending actions, the Trustee has sold substantially all of the assets of the estate. The Trustee instituted suit against the said S. Franklin Burford, and the suit was amended on the 22nd day of December, 1987, to claim $901,362.70 in damages. [*Michael L. Bray, Trustee, v. S. Franklin Burford*, Adversary Proceeding No. 87-0040.] This was approximately two months before the "Motion to Remove and Surcharge Trustee" was filed. The main bankruptcy case has been pending for two and one-half years.

8. The removal of the Trustee at this late date would be grossly unfair to the other creditors and would involve unnecessary additional costs to the estate. Removal should be exercised only if the administration of the bankruptcy estate would suffer more from the discord created by the present trustee than would be suffered from appointment of a successor trustee. *In re Microdisk, Inc.*, 33 B.R. 817 (Nev. D.C. 1983).

9. The accusations of S. Franklin Burford and Joseph F. Burford have been previously made by motion to sue the Trustee and by a complaint filed in the District Court for the Southern District of West Virginia. To rehear these accusations on a "Motion to Remove and Surcharge Trustee" would be duplicitous. The same accusations of fact have been made by S. Franklin Burford in all the recusal motions filed in adversary proceedings in which the Movant is a party and in the main bankruptcy case.

10. The accusations made by the Movant do not relate to the honesty and integrity of the Trustee, but relate to the alleged bad acts by the Trustee against S. Franklin Burford and Joseph F. Burford. S. Franklin Burford and Joseph F. Burford are two of the approximately 200 creditors of the Snowshoe Company.

11. The Movant, S. Franklin Burford, has filed a petition in bankruptcy in the Middle District of Florida, and upon such filing receives the protection of 11 U.S.C. § 362. This order does not fall within the purview of § 362(a) as denial of the "Motion to Remove and Surcharge Trustee" is not an act

against the estate of S. Franklin Burford.

It is accordingly so ORDERED.

ENTER: 3/29/88

L. Edward Friend, II
U.S. Bankruptcy Judge